

State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES
6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Mr. Steven M. Boyle
14 Germantown Road
Derry, NH 03038

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-027**

May 7, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the Division) to Steve M. Boyle, pursuant to RSA 482-A, RSA 483-B and Env-C 614 and Env-C 611. The Division is proposing that fines totaling \$6,000 be imposed against Steve M. Boyle for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Steven M. Boyle is an individual having a mailing address of 14 Germantown Road, Derry, NH 03038.

III. Summary of Facts and Law Supporting Claims

1. RSA 482-A authorizes the Department of Environmental Services (DES) to regulate dredging, filling, and construction in surface waters of the state, shorelines of surface waters, and in wetlands. RSA 482-A:11, I authorizes DES to adopt rules to implement the wetlands law. Pursuant to this authority, DES has adopted NH Admin. Rules Wt 100-700.
2. RSA 482-A:13 authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A. Pursuant to RSA 482-A:13, the Commissioner has adopted Env-C 614 to establish a schedule of fines for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A.
3. RSA 483-B authorizes DES to regulate the clear cutting of trees and the removal of stumps within the protected shoreland. RSA 483-B:17 authorizes DES to adopt rules to implement the Shoreland Protection Act. Pursuant to this authority, DES has adopted NH Admin. Rules Env-Ws 1400.

4. RSA 483-B:18,III(c) authorizes the Commissioner of DES to impose administrative fines of up to \$5,000 per offense for violations of RSA 483-B. Pursuant to RSA 483-B:17, the Commissioner has adopted Env-C 611 to establish a schedule of fines for such violations.

5. Steven Boyle is the owner of land located at 14 Germantown Road, Derry, NH with 50 feet of frontage on Big Island Pond, more particularly described on the Derry tax maps as map 19, lot 87 recorded at Book 3145, Pages 553 to 555 (the Property). Mr. Boyle purchased the Property on March 20, 1996.

6. In March 2000, two members of the Big Island Pond Shoreline Committee visited the Property and spoke with two individuals who were working in jurisdictional areas at the Property. They provided these individuals with DES Fact Sheets on wetlands jurisdiction and the wetlands permitting process, and a standard dredge and fill application, and recommended that the individuals not do more work in jurisdictional areas on the Property.

7. On April 11, 2000, DES received a complaint from the Big Island Pond Corporation, which stated that Judging by the contour of the shoreline and the adjacent walls along the shoreline, it appears the wall (75 feet long approx) was built approximately 15 feet further out into the lake than it was before. All work was done without a permit.

8. The April 11, 2000 complaint included photographs taken in March 2000 while the work was in progress. The photos show that the lake was drawn down, the stacking of the wall was in progress, at least one large stump was exposed at the natural shore, the area behind the wall was not backfilled, a Taylor Rental Bobcat # 763 was parked in the work area, and the two men who were working at the Property.

9. On April 12, 2000, DES requested property and tax map information from the Derry tax assessor and received the information on April 13, 2000.

10. On April 17, 2000, DES sent a letter to Mr. Boyle notifying him that DES had received a complaint regarding his wall construction, informing him of DES wetlands jurisdiction and enforcement authority, and requesting that he respond in writing to the allegations.

11. On May 24, 2000, DES received an application from Mr. Boyle that described his proposed project as Built a retaining wall in place of old eroding wall. When explaining the need for the project, Mr. Boyle wrote: The erosion of our shore line was taking place, we needed to repair or replace the wall. The old wall was made of stone. The new wall is made of diamond block with proper drainage and is filtered with crushed rock .

12. In a cover letter to the application, Mr. Boyle stated, Our property (lake frontage) has always been an uneven [sic] and always jettied out more than our neighbors on either side of us. Also the land went down at a slant into the water. So what we did was build from the bottom of that slant and built straight up. We also were told at the end of March that in about 5 days the water would be back up. So we made a rash decision and yes maybe an ignorant one, but we decided to hurry up and put the wall up.

13. On June 1, 2000, DES requested more information from Mr. Boyle regarding his application.

14. On June 7, 2000, DES received a letter and photos from Arthur and Rita Rother, neighbors to the Property, that stated, I m writing to let you know that with the rain we have had lately there is erosion along the wall that faces us. When that happens the water in front of our house becomes brownish with silt. I ve taken pictures to show the erosion should you want them in the process of this complaint .

15. On June 27, 2000, DES personnel met with the Rother and other neighbors, the Cunninghams, viewed a videotape of the Property taken on October 22, 1996, and received photos of the Property dated from 1996 and 2000.

16. On June 27, 2000, DES personnel inspected the Property and found the following:

(a) A wall measuring approximately 89 linear feet in length, and 4 feet 6 inches in height had been constructed in and adjacent to Big Island Pond.

(b) Six steps measuring approximately 7 feet wide had been built in the shoreline and as part of the wall.

(c) The wall was approximately 24 feet from the corner of the Boyle residence at its furthest extension.

(d) On one side of the wall, there was a weep hole landward of the wall where the fill had eroded. Through the cavity into the lake, the water could be seen moving in sync with the lake.

17. Examination of the 1996 photos and video reveal the following:

(a) The shoreline was well-vegetated with herbaceous vegetation and approximately 5-7 trees and showed no problems with erosion.

(b) The northwestern front corner of the house was located approximately 16 feet from the high water line of the lake.

(c) The shoreline was armored by rounded stone rocks and the elevation of the rocks was approximately 1 foot at most above the bed of the lake.

(d) There was a narrow two-step access.

18. On August 30, 2000, DES personnel reinspected the Property with Mr. Boyle s environmental consultant, Michael Seraikis. During this inspection, soil auguring was done in an attempt to locate the prior shoreline and buried stumps. No buried stumps were found and it was difficult to find the location of the original shoreline. Mr. Seraikis stated that he would prepare a restoration plan to remove the wall and a planting plan to replace lost trees.

19. On December 6, 2000, DES personnel met with Mr. Seraikis to review the file and what would be required for restoration of the Property. Mr. Seraikis submitted a restoration plan for the Property.

20. On January 29, 2001, DES personnel spoke with Mr. Seraikis and explained that the southern corner of the frontage did not show sufficient removal. Comparison of historical photographs with the restoration plan showed that the filled shoreline needed to be brought landward another 9 feet. Mr. Seraikis indicated that a revised restoration plan would be submitted within 30 days. During this meeting, Mr. Seraikis indicated that 2 stumps had been removed and the other 3 had been ground down.

21. To date, DES has not received a revised restoration plan.

22. RSA 482-A:3, I prohibits the excavation, removal, filling, dredging, or construction of any structures in or adjacent to any water of the state without a permit from DES.

23. Under RSA 482-A:4, II waters and adjacent areas is defined as wherever fresh water flows or stands...it shall apply to those portions of great ponds or lakes created by the raising of the water level of the same, whether by public or private structure, and to all surface waters of the state as defined in RSA 485-A:2 which contain fresh water....

24. Under RSA 485-A:2, XIV surface waters of the state is defined as streams, lakes, ponds and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses and other bodies of water, natural or artificial.

25. RSA 483-B:9, V(a)(2)(E) requires that, stumps and their root systems which are located within 50 feet of the reference line shall be left intact in the ground, unless removal is specifically approved by DES, pursuant to RSA 482-A.

26. Under Wt 101.34, fill means rock, soil, gravel, sand or other such material that has been deposited or caused to be deposited by human activity.

27. Big Island Pond is a jurisdictional water under RSA 482-A and RSA 483-B.

IV. Violations Alleged

1. Steven M. Boyle has violated RSA 482-A:3, I by constructing a retaining wall in waters of the state without a permit from DES.

2. Steven M. Boyle has violated RSA 482-A:3, I by placing fill in waters of the state behind the wall without a permit from DES.

3. Steven M. Boyle has violated RSA 483-B:9 V(a)(2)(e) by not leaving stumps and their root systems located within 50 feet of the reference line intact in the ground.

V. Proposed Administrative Fines

For the violation identified in IV. 1 above, Env-C 614.05(b)(2) specifies a fine of \$2,000.

For the violation identified in IV. 2 above, Env-C 614.05(f) specifies a fine of \$2,000.

For the violation identified in IV 3 above, Env-C 611.06(b) as in effect at the time of the violation specified a fine of \$1,000 for each stump pulled within 50 feet of the reference line. The Division is pursuing a fine for the removal of 2 stumps, for a combined fine of \$2,000 for these violations.

The total fine being sought is \$6,000.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, June 18, 2001 at 2:30 p.m. in Room C-110** of the DES offices at 6 Hazen Drive in Concord, NH. **Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than May 18, 2001**, using the enclosed colored form as follows:

1. If you plan to attend the hearing, please sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.
2. If you choose to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.
3. If you wish to discuss the possibility of settling the case, please sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If you wish to have a hearing but are unable to attend as scheduled, you must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If you do not notify Mr. Ballentine in advance and do not attend the hearing, the hearing will be conducted in your absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
 3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
 4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.


*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed.

The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced. If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

If you wish to have an informal meeting to discuss the issues, you must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If you have any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

 **COPY**
Harry T. Stewart, P.E., Director
Water Division

Enclosure (*NHDES Fact Sheet #CO-2 2000*)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Rules & Hearings Attorney
Harry T. Stewart, P.E., Director
Marjory Swope, NHACC
Michael Walls, DOJ/EPB
Michael Seraikis, Beaver Creek Consulting
Derry Conservation Commission
Derry Board of Selectmen
Mary Ann Tilton, WD/WB
Allyson Gourley, WD/CSP

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APPEARANCE

____ I will attend the hearing scheduled for **Monday, June 18, 2001 at 2:30 p.m.** in Room C-110 of the DES offices at 6 Hazen Drive in Concord, NH.

Signature

Date

Name (please print or type): _____

Title: _____

WAIVER OF HEARING

____ I certify that I understand my right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$6,000 paid to Treasurer, State of New Hampshire is enclosed.*

** If you pay by check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Signature

Date

Name (please print or type): _____

Title: _____

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095